No. 93-1585

(4)

In The

Supreme Court of the United States

October Term, 1993

NANCY ANONSEN and MICHAEL ANONSEN, individually and as next friends of WILLIAM BOOHER, JR.,
Petitioners,

vs.

PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLOW, KTRK, INC. D/B/A KTRK-TV, and MIRIAM BOOHER,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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May 5, 1994

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QUESTIONS PRESENTED

1. Is the judgment of the Texas Court of Appeals, First District, consistent with this Court's precedents, or does it conflict with the decisions of this Court?

2. Does the judgment of the Texas Court of Appeals, First District, precluding tort liability for an individual's voluntary discussion of true facts of legitimate public concern about her own life, present an important and substantial federal question that this Court needs to address?

3. Is there a parallel, adequate and controlling state law ground supporting the judgment of the Texas Court of Appeals, First District, that makes this an unsuitable case for this Court's review?

LIST OF PARTIES

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATE COURT OPINIONS

The Petitioners failed to include in their Petition for a Writ of Certiorari ("Petition") the letter opinion of District Judge I. Allan Lerner, 56th Judicial District. In granting summary judgment for Respondents, Judge Lerner decided the entire case on state law grounds, without reaching any federal issue. Respondents have included this letter opinion in the attached Appendix ("App.").

JURISDICTION

Respondents do not challenge this Court's jurisdiction under 28 U.S.C. § 1257(a) to consider this Petition.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Texas has adopted the Restatement of Torts (Second) § 652D definition of the tort of invasion of privacy through publication of private, embarrassing facts. It reads:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

Restatement (Second) of Torts § 652D.

Respondents relied in state court in part upon the free speech provision of the Texas Constitution, which reads in relevant part:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. ...

Tex. Const. art. I, § 8.

This case also involves the First and Fourteenth Amendments to the United States Constitution, which read in relevant part:

> Congress shall make no law ... abridging the freedom of speech, or of the press ... .

U.S. Const. amend. I.

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ... .

U.S. Const. amend. XIV, § 2.

STATEMENT OF THE CASE

The Proceedings in the District Court and Court of Appeals

Judge I. Allan Lerner, 56th District Court, granted all defendants summary judgment. In his letter opinion Judge Lerner held that, as a matter of Texas law, Petitioners failed to establish the essential element of their claim that Ms. Booher's undisguised discussion of her family life on the *Donahue Show* was *not* a matter of legitimate public concern. App. at 2-3. Because the Petitioners could not prove an essential element of the tort, the District Court ruled that Respondents were entitled to summary judgment.

The District Judge also ruled that Texas law provided Nancy Anonsen's husband, Petitioner Michael Anonsen, no cause of action for the alleged invasion of privacy of his wife. App. at 5. He further held that Petitioners' claims for

intentional infliction of emotional distress failed because the Respondents' conduct was not "extreme and outrageous" as required by Texas law. App. at 5.

The Court of Appeals, First District, affirmed Judge Lerner's judgment in an opinion reported at 857 S.W.2d 700 and included in the Petitioners' Appendix at 5a.

The Texas Supreme Court denied discretionary review. Petition at 19-22a.

Statement of Facts

The Texas Court of Appeals' opinion adequately states the facts as they are to be considered in reviewing the affirmance of a grant of summary judgment. However, because Petitioners have gone beyond that opinion, and beyond what the record supports, Respondents briefly re-state the facts.

Miriam Booher appeared undisguised on the *Donahue Show* in January 1989, and talked about how incest and rape, the topic of that broadcast, had affected her life and her family. Ms. Booher opened the show by describing her experience raising a child born of incest. Her 12-year old daughter had given birth to a son, and Ms. Booher and her husband adopted and raised the boy as their own. Five years later Ms. Booher learned that the biological father of the boy was her own husband. On the program, Ms. Booher discussed her decision to remain in the marriage even after discovering this fact, and she explained her failure to report the crime at that time was because her husband himself was a police officer. Tr. 113-21.

At each stage in this case, Petitioners have used increasingly vehement language to demonize Ms. Booher. Petitioners now call Ms. Booher "one of the victimizers" and actually charge her with *criminal* conduct. Petition at 11,

12. The record refutes these caustic accusations. The Texas Court of Appeals understood that Ms. Booher, "like her daughter and grandson, is herself one of the victims of the family tragedy of incest." 857 S.W.2d at 705.

As the Court of Appeals noted, Ms. Booher explained that upon learning the truth, she ordered her husband to leave, but reconciled with him due to economic hardship while maintaining physical separation from him. 857 S.W.2d at 702. Foreign-born and unable to read or write English, she could only obtain menial jobs, and she (rightly) feared for the welfare of her children. *Id.* Ms. Booher did not formally report the crime to the authorities because her husband, an Arkansas State Trooper, continually reminded her that *he was* "the law" in the small Arkansas towns where they lived. Tr. 121. However, employees of the Arkansas State Police, including its director, were aware of the rape and incest. No action was taken; no investigation was pursued. Tr. 134-35. After the boy learned the truth, the need for pretense vanished, and later Ms. Booher and her husband separated and were divorced. 857 S.W.2d at 702.

With the help of her son, Petitioner William Booher, Jr., Ms. Booher wrote a letter to Phil Donahue about her family's experience with incest. Tr. 116-21. Appearing on the *Donahue Show*, Ms. Booher described these events in her own life without using the names of her daughter, her husband, or her adopted son (and biological grandson). She did not reveal where any of her family lived, nor did she describe any of the acts of incest which her daughter suffered. Tr. 113-21.

Several other rape and incest survivors appeared on the show to discuss the repercussions for victims and family members when children are born as a result. A clinical psychologist also appeared. The show dealt at length with the need for public awareness and recognition of incest, which is necessary to allow victims to recover from the

shame and psychological trauma associated with this too-often hidden crime. As Mr. Donahue stated, "Secrecy is the great accomplice here." Tr. 120. Soon after the broadcast, and as a direct result of it, State Trooper Bill Booher, who never denied the incest, was finally forced to resign. Tr. 144-48, 159-60, 168, 171-82.

Plaintiffs misstate the record by claiming that Mr. Donahue admitted "sensationalizing" his shows. Petition at 4. Mr. Donahue said no such thing. He conceded that his show faced competition and that part of his audience expects to be entertained as well as be informed, but he adamantly denied that he compromised his journalistic standards in any way in response to competition. 2d Supp. Tr. 119-21, 226-34.

Nor did Mr. Donahue admit that he "violated his own standards" in this program, as Petitioners for the first time now claim. Petition at 5. In fact, Mr. Donahue explained that he would allow a parent to discuss the rape of a child, and would presume, in the absence of contrary indications, that the parent had the child's consent. Tr. 134-35.

Finally, there is simply no support in the record for the Petitioners' assertion, made now for the first time, that Ms. Booher made "repeated and express pledges of confidentiality to petitioners." Petition at 5. Ms. Booher at one point had "told [Nancy] Anonsen that she had cancelled her plans to appear." 857 S.W.2d at 702; Tr. at 1261. There is no evidence of a pledge of confidentiality, a promise, or an agreement; only a single statement of her current intention not to appear. Tr. 1261. Nor is there *any* evidence the Donahue Respondents knew of Ms. Booher's statement to her daughter, let alone any "express pledge of confidentiality."

REASONS FOR DENYING THE WRIT

I.

THE TEXAS COURT OF APPEALS' JUDGMENT DOES NOT CONFLICT WITH THIS COURT'S DECISIONS.

The Texas Court of Appeals' decision affirms the unremarkable proposition that Texas common law cannot impose tort liability for the disclosure of true information about oneself that is of legitimate public concern, even if as a consequence private information about others might be revealed. Petitioners ask this Court to review and reverse the judgment, so they may pursue actual and punitive damages based on a wholly novel proposition: liability against their own mother, for telling the truth about a tragedy that happened to herself and her family -- a revelation that finally caused an Arkansas State Trooper who had committed rape and incest to resign. This Court has never yet sanctioned the imposition of civil liability for the publication of truthful information on an invasion of privacy theory, *see Florida Star v B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603, 2605-06, 105 L. Ed.2d 443 (1989), and this is not a suitable case to consider the possibility.

In fact, this Court recently recognized a person's right truthfully to discuss important events in his own life, even if it might disclose information embarrassing to others. In *Butterworth v. Smith*, 494 U.S. 624, 110 S. Ct. 1376, 108 L. Ed.2d 572 (1990), this Court reviewed a Florida statute that prohibited a reporter from recounting his experience testifying before a grand jury, even though the grand jury had completed its investigation. The State argued that the need for grand jury secrecy continued, because those who were investigated but not indicted by the grand jury might be embarrassed by the reporter's disclosures. Nonetheless,

Chief Justice Rehnquist, for a unanimous Court, wrote:

> [E]ven in those situations where the disclosure by the witness of his own testimony could have the effect of revealing the names of persons who had been targeted by the grand jury but exonerated, our decisions establish that absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech.

494 U.S. at 634, 110 S. Ct. at 1382.

The Petitioners do not mention *Butterworth*, and do not claim that the Texas Court of Appeals' *judgment* conflicts with any ruling by this Court. Rather, they now argue at length that the opinion's *language* is inconsistent with this Court's approach in *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed.2d 443 (1989). Petition at 6-25. "This Court, however, reviews *judgments*, not *statements in opinions*," *California v. Rooney*, 483 U.S. 307, 311, 107 S. Ct. 2852, 2854, 97 L. Ed.2d 258 (1987) (emphasis added), or it would forever be correcting language it might not have chosen. The Petitioner made no argument based on *Florida Star* in State court, and never claimed that it controlled the outcome. Because the Petitioner never made the *Florida Star* argument it now makes, this Court should not grant review to consider it now. *Illinois v. Gates*, 462 U.S. 213, 217-24, 103 S. Ct. 2317, 2321-25, 76 L. Ed.2d 527 (1983) (refusing to consider grounds asserted by State, for the first time on petition to Supreme Court, for reversing the state court's recognition of respondent's constitutional rights).

In any case, the Court of Appeal's judgment is entirely consistent with *Florida Star*. There, this Court held that a newspaper's publication of a rape victim's name obtained from government records was constitutionally

protected from an invasion of privacy suit. Here, the Texas Court of Appeals has similarly refused to impose liability for a woman's voluntary disclosure of the story of her own life.

This outcome is compatible with this Court's other privacy decisions as well. In the absence of an enforceable confidentiality agreement, this Court has consistently rejected liability against a person for the "truthful statement of information he acquired on his own." *Butterworth*, 494 U.S. at 635, 110 S. Ct. at 1383.

For example, in *Cox Broadcasting v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed.2d 328 (1975), this Court held that a television station could not be held liable for broadcasting the name of a rape-murder victim which had been obtained from courthouse records. In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed.2d 399 (1979), this Court held that the First Amendment precludes punishing a newspaper for publishing a juvenile offender's name when the name was legally obtained. In *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 97 S. Ct. 1045, 51 L. Ed.2d 355 (1977), it held that a State cannot constitutionally enjoin the publication of a juvenile offender's name, and in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed.2d 1 (1978), that a State could not convict for publishing information obtained from a state judicial review commission.

Because the Petitioner cannot show any conflict between the Texas Court of Appeals' ruling and decisions of this Court, this Court should deny review.

II.

THE PETITIONERS' ATTEMPT TO CREATE AN IMPORTANT FEDERAL QUESTION DISTORTS THE COURT OF APPEALS' DECISION, THE RECORD, AND THE LAW.

Petitioners greatly exaggerate the breadth and impact of the Texas Court of Appeals' decision in claiming that its "language is unlimited" and that it has "eliminated the tort of public disclosure of private facts." Petition at 7. Petitioners ignore that this Court does not review the *language* of state court opinions, but rather their *judgments*. *Rooney*, 483 U.S. at 311, 107 S. Ct. at 2854.

The holding at issue is narrow: Ms. Booher could appear undisguised on television to discuss the consequences of her husband's crime, without fearing civil liability. There is ample record support that not only are incest and rape of legitimate public concern (especially when committed by a State Trooper), but also that personal identification increases a speaker's legitimacy and helps defeat the true accomplice of incest: shame and secrecy. Tr. 186-87.

The Texas Court of Appeals' ruling does no more than protect a person's right to speak freely of such serious matters. The ruling says nothing about disclosures of matters *not* of legitimate public concern. Nor does it protect gratuitous disclosures outside the context of meaningful discourse, let alone the disclosure of private information in violation of an enforceable agreement. The Court specifically stated that its ruling was confined to the "particular facts and circumstances of this case." 857 S.W.2d at 704.

The Court of Appeals' decision is actually *narrower* than many other decisions, because Ms. Booher disclosed

information about *herself*, while courts regularly uphold the right to disclose information about *others*.[1] There is nothing shocking about a holding that Ms. Booher is entitled to tell her own story without wearing a mask. The contrary holding *would* be astonishing: a ruling that Ms. Booher would have to disguise herself to appear on the *Donahue Show*, and must write her autobiography anonymously. 857 S.W.2d at 706.

For the first time ever, the Petitioners now claim that Ms. Booher violated "repeated and express pledges of confidentiality to petitioners." Petition at 5. The Petitioners did not raise this argument before the Texas District Court, Court of Appeals, or Supreme Court, either by pleading such an agreement or even mentioning it in their numerous briefs, perhaps because the record discloses *no* evidence of any enforceable "pledge of confidentiality." There is simply no record support for the Petitioners' newfound reliance on *Cohen v. Cowles Media Co.*, 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed.2d 586 (1991).

Even if there was record support, this Court cannot grant certiorari to review an issue never presented or decided in State court. *Illinois v. Gates*, 462 U.S. 213, 217-24, 103 S. Ct. 2317, 2321-25, 76 L. Ed.2d 527 (1983). State courts are to be given the first opportunity at resolving such questions, even of federal law. *Id.*

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[1] *E.g.*, *Cape Publications v. Bridges*, 423 So.2d 426 (Fla. App. 1982), *cert. denied*, 464 U.S. 893 (1983); *Hubbard v. Journal Publishing Co.*, 368 P.2d 147 (N.M. 1962); *Howard v. Des Moines Register*, 283 N.W.2d 289 (Iowa 1979); *Meetze v. Associated Press*, 95 S.E.2d 606 (S.C. 1956); *Bremmer v. Journal-Tribune Publishing Co.*, 76 N.W.2d 762 (Iowa 1956).

And even if there had been an enforceable "pledge," and even if Petitioners *had* raised this "pledge" issue in state court and had it decided, there is no record or legal support for binding Respondents Phil Donahue, Jose Pretlow, Multimedia, or KTRK-TV to such a pledge. Even now, the Petitioners do not try to claim that any of these Respondents were party to or were even aware of any such "pledge." Because these Respondents never made any agreement restricting their right to publish truthful information, *Cohen* cannot apply.

Petitioners' argument is further confused by their fundamental misunderstanding of the nature of First Amendment rights. Petitioners claim that "If Booher had publicized her allegations without any help from Donahue, she would have had no constitutional protection at all." Petition at 10. This of course is entirely mistaken; individual citizens need not resort to the press to have First Amendment rights. *E.g., Organization for a Better Austin v. O'Keefe*, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed.2d 1 (1971) (First Amendment applies to individual pamphleteers); *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253 (Tex. 1983) (lone picketers have First Amendment rights).

This Court should preserve its limited number of writs for cases that present clearly articulated important questions of federal law definitively raised by the record. Petitioners do not present such a case, and this Court should not grant review.

III.

THIS CASE DOES NOT IN FACT PRESENT AN IMPORTANT *FEDERAL* QUESTION FOR THIS COURT TO RESOLVE.

The importance of any federal law issue reached by the Texas Court of Appeals is greatly diluted by the presence of a parallel, adequate, and controlling issue of Texas law. At each level in state court, the key issue addressed by both sides was whether Ms. Booher's appearance on the *Donahue Show*, particularly her *undisguised* appearance, was a matter of legitimate concern to the public. Proof that it was *not* of legitimate interest was an essential element of the Petitioner's state law cause of action. Adopting Section 652D of the Restatement (Second) of Torts, the Texas Supreme Court held that to recover for the tortious disclosure of private facts, a plaintiff must show:

> (1) that publicity was given to matters concerning his private life,
>
> (2) the publication of which would be highly offensive to a reasonable person, and
>
> (3) that the matter publicized is not of legitimate public concern.

Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 682 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977). Texas law simply provides no remedy for the publication of true facts of legitimate public interest.

Texas courts, and federal courts applying Texas law, have repeatedly recognized the common law nature of this

third element. *See, e.g., Industrial Foundation of the South*, 540 S.W.2d at 682; *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (5th Cir. 1994); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 275 (5th Cir. 1989). The main cases relied upon by the Texas Court of Appeals in this case, in fact, *Ross*, above, and *Dresbach v. Doubleday & Co., Inc.*, 518 F. Supp. 1285, 1287 (D.D.C. 1981), treat this question, as have many other cases, as one of common law, not constitutional law.[2]

No doubt, courts have recognized a parallel constitutional privilege. *E.g. Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980). The state law tort element of "no legitimate public concern" are grounded on free speech principles, but its interpretation and application is initially a matter of state law. Where non-constitutional grounds exist, this Court refuses to reach constitutional implications. *Lying v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 S. Ct. 1319, 1321, 99 L. Ed.2d 534 (1988). Where a state law element adequately insures rights concomitantly protected by federal law, there is no pressing need for this Court to explore the scope of the federal right.

Surely, the Court of Appeals' opinion does speak in terms of Ms. Booher's "*right* to reveal her identity in telling the story of her experience." 857 S.W.2d at 705 (emphasis added). It seems hard to imagine how she could lack that right. Just as surely, the Texas Court of Appeals' recognition of that right was bounded by the context of Ms.

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[2]*E.g., Howard v. Des Moines Register*, 283 N.W.2d 289 (Iowa 1979); *Hubbard v. Journal Publishing Co.*, 368 P.2d 147, 148 (N.M. 1962); *Buzinski v. Doall Company*, 175 N.E.2d 577, 579 (Ill. App. 1961); *Meetze v. Associated Press*, 95 S.E.2d 606, 609 (S.C. 1956); *Bremmer v. Journal-Tribune Publishing Co.*, 76 N.W.2d 762, 765 (Iowa 1956).

Booher's appearance on a show that seriously addressed the issues Ms. Booher was raising: "we find the analysis of the third element of the tort [the publicizing of matters not of legitimate public concern] to be dispositive of the appeal." 857 S.W.2d at 703.

Petitioners never argued that rape and incest are not matters of legitimate public concern, but only that Miriam Booher's *identity* was not important to her story. However, the record fully supports the conclusion accepted by Judge Lerner that her undisguised appearance had serious value in legitimizing her story, and in defeating the veil of secrecy and shame that has too often kept incest a dirty family secret. Tr. 186-87; App. at 3.

This Texas common law element means that little could be achieved by this Court's granting review. Whatever the scope of federally-guaranteed rights, Texas law will require proof that the matter disclosed lacked legitimate concern to the public. The existence of non-constitutional grounds which alone might have served as an adequate ground for disposition of the case is a ground for not reaching the constitutional issue at all. *Alma Motor Co. v. Temken-Detroit Axle Co.*, 329 U.S. 129, 67 S. Ct. 231, 91 L. Ed. 128 (1946).

This significant overlap between state tort law and federal constitutional privileges, plus the fact that the Texas Court of Appeals, First District, *protected* a citizen's right to speak rather than restricted it, *Michigan v. Long*, 463 U.S. 1032, 1067-68, 103 S. Ct. 3469, 3490-91, 77 L. Ed.2d 1201 (1983) (Stevens, J., dissenting), means that this would not be a meaningful case for this Court to review. If and when this Court is presented with a state court judgment that finds the constitutional privilege for publications of public concern to be lacking, the need for review arguably would be stronger.

IV.

THE TEXAS COURT OF APPEALS' JUDGMENT IS SUPPORTED BY OTHER ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.

Much of the Texas Court of Appeals' judgment can be supported on state law grounds, making this Court's review of the case even less important. These sufficient grounds of state law mean that this Court's review would have no effect on the final judgment.

1. Petitioner Michael Anonsen has no cause of action.

Judge Lerner held that Texas law provided Petitioner Michael Anonsen no cause of action for the alleged invasion of his wife's privacy. App. at 5. *See Moore v. Charles B. Pierce Film Enterprises, Inc.*, 589 S.W.2d 489 (Tex. Civ. App.--Texarkana 1979, writ ref'd n.r.e.) (brother cannot recover for alleged invasion of privacy of sibling); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1093 (5th Cir. 1984) (Texas law does not permit recovery by husband for invasion of privacy of wife), *cert. denied*, 469 U.S. 1107 (1985). Although the Court of Appeals did not reach the issue, Petitioner made no argument before the Court of Appeals that would justify a different outcome on remand.

2. Texas law bars Petitioners' "infliction of emotional distress" claims.

Petitioners' related tort claim of "negligent infliction of emotional distress" has been eliminated by the Texas Supreme Court. *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993); *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993). Further, their claim of "intentional infliction of emotional

distress" was disposed of by the District Court on state law grounds, because they failed to show that the Respondents' actions were "extreme and outrageous." App. at 5. Again, a remand could not change the result as to these claims.

CONCLUSION

For the reasons stated above, this Court should deny the Petitioners' Petition for a writ of certiorari to the Texas Court of Appeals, First District.

Respectfully submitted,

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APPENDIX

56th District Court
Galveston County
GALVESTON, TEXAS 77550
COUNTY COURTHOUSE

I. ALLAN LERNER
JUDGE

January 23, 1991

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IN RE: CAUSE NO. 89CV0297 IN THE 56TH DISTRICT COURT
NANCY ANONSEN, ET AL VS. PHIL DONAHUE, ET AL

Dear Counsel:

In connection with the motions for summary judgment filed by all the defendants, first let me address the objections to defendants summary judgment proof. I have reviewed the objections and they generally deal with hearsay and speculation objections. Some objections are good; but even after deleting those portions of the summary judgment proof I believe that the summary judgment evidence shows without dispute that 1) a substantial number of people knew that Nancy Anonsen was the adopted daughter of William Booher prior to the broadcast in

question and, 2) that William Booher would not have resigned his position with the Arkansas State Police but for the broadcast. However, as later indicated herein, it is my judgment that neither of these matters are decisive in deciding the motions for summary judgment.

All parties agree that there is a common law cause of action in Texas for an invasion of privacy. Industrial Foundation of the South v Texas Industrial Accident Board, 540 SW2d 668. Nor do the parties disagree as to the elements of this cause of action as set out in Restatement (Second) of Torts, 652D, adopted in Industrial Foundation, supra. One of the elements which is the element in dispute herein, requires a showing that the matter publicized is not of legitimate public concern.

The parties disagree as to whether or not the question of legitimate public concern is one of fact or a question of law to be resolved by the Court.

Somewhat similar to the issue of legitimate public concern is the issue of whether a person is a "public figure" in defamation cases, and whether defamatory statements are expressions of fact or opinion. Texas Courts it appears have held these matters to be questions of law, Jacobs v McIlvan, 759 SW2d 467; Houston Chronicle Pub. Co. v Stewart, 668 SW2d 727; El Paso Times v Kerr, 706 SW2d 797. There are cases cited by the plaintiffs where the issue of legitimate public concern is held to be a fact issue for the jury. Among them are Hall v Post, 355 SE2d 819. Cases also go in the opposite direction most notably a Fifth Circuit case Ross v Midwest Communication, Inc., 870 F2 271.

As a shading of this issue it has been held that it may be in the public interest to know about some general activity (body surfing) as a matter of law, but it may be a jury question as to whether it is in public interest to know "private" facts about individuals engaged in that activity Virgil v Time, Inc., 527 F2d 1122. Also in cases of "false light" invasion of privacy cases fact issue are generally stated since there is an issue as to whether the reported facts or portrayal of the plaintiff are factually true or not. Cantrell v Forest City Pub. Co., 419 U.S. 245; Brun v Flynt, 726 F2d 245.

I am inclined to find that the issue of legitimate public concern is a question of law for the Court to decide, because of the Texas cases dealing with related matters cited above, and because of the Fifth Circuit opinion in Ross, supra. I think incest as discussed on the Donahue Show in question was an issue of legitimate public concern.

Plaintiff Nancy Anonsen's name was not disclosed on the show although Defendant Miriam Booher gave her name. Whether of not Miriam Booher's identity was integral to the topic of incest is the next issue. The plaintiffs seem to suggest that the show would have lost no credibility had Miriam Booher not disclosed her name, or should otherwise have guarded against her identity. In viewing the video this would have seemed to be impractical given the format of the show.

For the reasons stated in Ross v Midwest Communication, Inc., Supra, to gain credibility establishes the nexus in my judgment, between divulging the mother's name and legitimate public concern in incestuous relationships.

Defendants further contend that disclosing William Booher to be a State Trooper was of legitimate public concern or the nexus for disclosing his and the defendant Miriam Booher's name. However, it would appear that this was not a planned purpose for the topic to be aired and was only an incidental result thereof and not the main focus of the show. Although it may have been an unintended result of the interview it may well establish a nexus to the general topic of incest. This fact had been made known to the promoters of the show in the letter from Miriam Booher to the show's producers.

Interwoven in the issue of legitimate public concern is the issue of first amendment rights of the defendants. As stated in Dresbach v Doubleday & Co., Inc., 518 F Supp 1285,

> "However, we tread on dangerous ground deciding exactly what matters are sufficiently relevant to a subject of legitimate public interest to be privileged. First Amendment values could obviously be threatened by the uncertainty such decisions could create for writers and

> publishers. Only in cases of flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists should a court substitute its judgment for that of the publisher."

Dresbach at page 1290. See also Cox Broadcasting Corp v Cohn, 420 US 469; Campbell v Seabury Press, 614 F2d 395. Time, Inc v Hill, 385 US 374.

Constitutional guaranties of freedom of speech and press do not eliminate all claims for invasion of privacy but seem to leave a very narrow window allowing recovery only in cases of flagrant breaches of privacy as stated in Dresbach, supra; Cantrell v Forest City Pub. Co., 419 US 245 distinguishing Time, Inc. v Hill, 385 US 374. Examples are Hall v Post, supra. where a statute protected disclosure of adoption records; Virgil v Time, Inc., supra, where curious behavior of the body surfer was held to have no relation to the story of public concern, body surfing; Deaton v Delta Publishing Co., 326 SO2d 472 naming and showing pictures of mentally retarded children in the course of a story about special education classes. Plaintiff would argue that giving the means of identifying a victims of incest is as flagrant as the examples cited above, but my thinking is otherwise. The victims were not expressly named, they were part of the story and in my judgment the defendants were protected by first amendment constitutional considerations. What was said in Dresbach, supra might well apply here.

> "It is easy to sympathize with his objection to the Book having been written at all and certainly to his inclusion in it,"....."I asked not to be in the book. I have a right to my own privacy"....."Clearly, this society has put a higher value on open criminal proceedings and on public discussion of all issues than on the individual's right to privacy"

I find the Donahue program as presented and Mrs. Booher's participation to be of legitimate public concern as a matter of law and therefore would grant all of the defendants motions for summary judgment. Having said this it may not be

necessary to discuss other issues in the case but for whatever purpose it might serve I will try to review these other matters as well.

Defendants contend that because of the large number of people that were aware of the facts surrounding the family relationship before the broadcast in question that these facts were no longer "private". Defendants cite as principal authority for this position Porter v Channel 7 of Detroit, 17 Med. L. Rptr., 1898. Plaintiff cites Hall v Post, supra. I think at best there is a fact issue in this regard and am inclined to follow the language in Hall v Post, stating:

> "The fact that a plaintiff may have spoken freely to a small, select number of people about a private matter is not in itself a making public of the information disclosed." "There is an 'obvious and substantial difference' between this type of selective disclosure and 'the disclosure of the same facts to the public at large.'"

As to the contention that Miriam Booher as a parent of William Booher, Jr. consented as a matter of law to his adoptive mothers' disclosure of her identity on the show, there is some authority that Sec. 12.04(2) of the Family Code would authorize such consent at least as to publication of pictures of a minor. Faloona v Hustler Magazine Inc., 607 Supp 1341. The Faloona case involved a release executed by the mother and I am not prepared to hold that in effect a minor cannot sue his parent for invasion of the minor's privacy. See Jilani v. Jilani, 767 SW2d 671 where the statement is made, "other exceptions to the doctrine that a minor cannot sue his parents are recognized by some courts when the parent's actions constitute an intentional tort." See also Wallace v Wallace, 466 SW2d 416. Defendant's contention in this regard is denied.

As to the contention that Michael Anonsen has no cause of action for mental anguish because of an invasion of his wife's privacy, I think the defendants are correct under Wood v Hustler Magazine, Inc., 736 F2d 1084 where the Court states "The district court was clearly erroneous in finding that Billy suffered mental anguish for the invasion of his privacy. Texas does not permit a

plaintiff to recover for injury caused by the invasion of another's privacy."

Last is the cause of action asserted against Mrs. Booher for negligent and intentional infliction of emotional distress. Tidelands Auto Club v Waters, 699 SW2d 939. If the disclosure is protected under free speech then it cannot be the basis for a cause of action for negligent or intentional infliction of emotional damage. Deupree v Iliff, 860 F2d 300. Legitimate public concern as indicated above does involve first amendment rights. In addition an action for intentional infliction of emotional distress requires the conduct complained of to be extreme and outrageous. I find as a matter of law that the conduct complained of here by the plaintiffs was not extreme and outrageous.

Based on the foregoing I would grant all the defendants motions for summary judgment and would ask that Mr. George prepare an order to this effect and submit such proposed order to all other counsel for approval as to form.

Very truly yours,

I. Allan Lerner, Judge

IAL/ka